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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN EDISON COMPANY,
JERSEY CENTRAL POWER & LIGHT COMPANY,
and PENNSYLVANIA ELECTRIC COMPANY, *Petitioners*,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*, *Respondents*.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and THE UNITED STATES OF AMERICA, *Petitioners*,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*, *Respondents*.

REPLY BRIEF OF PETITIONERS METROPOLITAN EDISON COMPANY, ET AL.

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REPLY BRIEF OF PETITIONERS METROPOLITAN EDISON COMPANY, ET AL.

Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company, petitioners in No. 81-2399 (hereinafter "private petitioners"),[1] submit this reply brief in response to the brief filed by respondent People Against Nuclear Energy ("PANE") in opposition to the petitions for a writ of certiorari.

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[1] In compliance with Supreme Court Rule 28.1, the parent and affiliate corporations of the private petitioners were listed on page i of their petition for a writ of certiorari.

ARGUMENT

I. NEPA Does Not Encompass Public Fears Of Federally Licensed Projects

Throughout its brief PANE makes a number of arguments apparently intended to establish a link between the psychological distress it alleges and some direct physical impact on the natural environment. *See, e.g.*, PANE brief at 18, 24-26. In particular, PANE asserts that its members have suffered "actual exposure to radiation that may cause serious physical health effects, including genetic damage" as a result of the TMI-2 accident; that restart of TMI-1 carries with it the potential for a "holocaust"; and that this is "precisely the sort of impact on the natural or physical environment" that is necessary to trigger the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA").[2] PANE brief at 42-43, 45. These arguments confuse the issues actually presented by this case.

This is not a tort action to recover for personal injuries or emotional distress caused by the accident at TMI-2. The issue is not what radiation was released from TMI-2,

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[2] The American Psychological Association ("APA") has filed an *amicus curiae* brief in support of PANE that takes a slightly different tack. The APA argues that normal operation of TMI-1 will have a direct physical impact on the environment through the "dramatic alteration of conditions of temperature and pressure within the reactor and through other physical effects of reactor operation." APA brief at 14. The APA has clearly misunderstood PANE's contentions. PANE itself has never sought to link its psychological distress with the physical effects of normal operation. Rather, PANE's contentions speak in terms of "a reoccurrence of the accident," and the "spectre of disaster." This case involves not the effects of normal operation, but, in Judge Wright's words, psychological distress "caused by fears of recurring catastrophe" at TMI-1. 678 F.2d at 230.

nor what stress may have resulted from the accident.[3] Rather, the issue raised by PANE's contentions is what psychological distress would be caused by restart of TMI-1. Thus the task forced on the Commission is to *predict* the psychological reaction to a future event, not to *measure* the emotional injury caused by an incident in the past.

Furthermore, the actual safety of TMI-1 is not in issue here. That subject was thoroughly covered in an evidentiary hearing lasting more than six months. PANE chose not to participate in that process and in fact admitted to the Licensing Board below that the point of its contentions is not "the actual safety threat of TMI Unit 1," since PANE's members allegedly will suffer stress from the operation of the plant "regardless of whether TMI Unit 1 were absolutely safe."[4] Thus PANE has no interest in determining whether there is in fact the potential for a "holocaust" at TMI-1. Instead, PANE and the

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[3] PANE's brief leaves the reader with the impression that both of these effects were quite severe. Yet the Report of the Kemeny Commission, upon which PANE relies heavily, concludes that the psychological distress resulting from the TMI-2 accident was "short-lived" and that the radiation released off-site was so low that it will cause "no case of cancer or the number of cases will be so small that it will never be possible to detect them." The Kemeny Commission found that the maximum estimated radiation dose received by any one individual was less than annual natural background radiation, and the average dose to a person living within 5 miles of the plant was no more than 10% of the annual background radiation. Report of the President's Commission on the Accident at Three Mile Island at 12, 13, 34 (Oct. 1979) (Joint Appendix in the court of appeals at 258, 259, 266).

[4] PANE's Reply Brief on Psychological Distress Issues at 12 (Joint Appendix in the court of appeals at 225).

court of appeals would have the Commission consider the "fears of recurring catastrophe" at TMI-1 wholly without regard to the actual impact or safety of the plant. The private petitioners believe that NEPA should not be extended to encompass fear of a federal licensing decision, as opposed to the actual environmental effects of the decision itself.

II. The Commission's Statement Of Policy Does Not Obviate The Need For Supreme Court Review

PANE argues that the petitions should be denied because of the Commission's Statement of Policy narrowly construing the court of appeals' decision.[5] PANE brief at 19-25. PANE believes that the decision below will be confined to Three Mile Island and that Supreme Court review is therefore unwarranted. The Statement of Policy does nothing, of course, to protect other federal agencies, and it is significant that Judge Wright's majority opinion is sufficiently broad and threatening that a number of organizations within and without the nuclear industry expended the time, money and effort necessary to file *amicus curiae* briefs.[6] Even within the nuclear industry the effect of the Statement of Policy is uncertain. We note that the Solicitor General has stated in his petition that, notwithstanding the Statement of Policy, "as long as the court of appeals' decision stands, any Commission ruling

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[5] 47 Fed. Reg. 31,762 (July 22, 1982). The Statement of Policy was issued after the private petitioners filed their petition in this Court.

[6] *Amicus curiae* briefs in support of the petitions have been filed by the National Association of Manufacturers, American Mining Congress, Chamber of Commerce, Scientists and Engineers for Secure Energy, National Rural Electric Cooperative Association, Edison Electric Institute and Atomic Industrial Forum.

excluding psychological stress contentions from a proceeding runs a substantial risk of reversal, for the reasons suggested by Judge Wilkey's dissent." NRC petition at 28 n.22. What is certain is that the court of appeals' decision will generate continuous litigation. In two separate NRC licensing proceedings, intervenors have already challenged the Statement of Policy as invalid.[7] In one of those cases, the intervenor has filed a petition for review in the United States Court of Appeals for the Sixth Circuit asking that the Statement of Policy be set aside. *Sunflower Alliance, Inc. v. NRC*, No. 82-3563 (6th Cir., filed Sept. 13, 1982). Unless the decision below is reversed, Judge Wright's majority opinion is likely to cause mischief in NRC licensing proceedings for years to come.[8]

Furthermore, even if the court of appeals' decision were effectively limited to Three Mile Island, the injury to the private petitioners is sufficiently extreme to justify Supreme Court review. PANE would have the Court believe that the Commission can comply with the lower court's judgment quickly and easily, without delaying restart of TMI-1 or otherwise prejudicing the private petitioners. PANE brief at 28-31.[9] To say that an agency

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[7] *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), NRC Docket Nos. 50-440, 50-441; *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), NRC Docket Nos. 50-400, 50-401.

[8] This is particularly true because of the important role of the District of Columbia Circuit in reviewing administrative agency decisions. *Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 536 n.14 (1978).

[9] The private petitioners take strong exception to the use that PANE makes of a quotation from Commissioner Gilinsky on page 30 of its brief. PANE gives the impression that Mr. Gilinsky believed all

conceivably could comply with an erroneous court decision is not to say that Supreme Court review is unwarranted. Moreover, such compliance is likely to result in a disastrous delay in restarting TMI-1.

If the Commission decides, as PANE insists, that under the terms of the court of appeals' decision a supplemental EIS is required, the ensuing NEPA process could be endless. PANE would first have the NRC conduct a further "predictive" field study and consider additional "clinical evaluations," which PANE itself assumes would require four months.[10] These studies would then have to be factored, along with the numerous post-accident stress studies already conducted by others, into a draft EIS, including a new cost-benefit balance. Under NEPA requirements, the draft statement would have to be published for comment and circulated to the Council on Environmental Quality and other government agencies. A final EIS reflecting comments received would then have to be issued. PANE has insisted before the Commission, citing NEPA, the Atomic Energy Act and the Commission's regulations, that the Commission must then hold an "adjudicatory trial-type" hearing on the psychological stress issue.[11] Such a hearing under NRC regula-

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steps associated with the psychological stress evaluation could be completed by the end of the summer. Yet taken in context, Mr. Gilinsky's statement clearly refers *only* to the initial decision of whether a full environmental impact statement ("EIS") is necessary. He did *not* state or imply that the entire process could be completed by the end of the summer. *Metropolitan Edison Company* (Three Mile Island Nuclear Station, Unit No. 1), CLI-82-13 (July 16, 1982) (Separate Views of Commissioner Gilinsky, at 1).

[10] PANE Response to Licensee's Motion with Respect to Psychological Health Issue, filed with the Commission on June 3, 1982, at 5.

[11] *Id.* at 5-19.

tions involves, like the TMI-1 restart hearings already conducted, use of discovery, opportunity for numerous procedural motions, hearing testimony and cross-examination, proposed findings of fact and conclusions of law, preparation of an initial decision by a Licensing Board, and review of that decision by the Commission.[12] Private petitioners' counsel estimates, on the basis of experience in the TMI-1 restart hearing and extensive experience in other NRC licensing proceedings, that the procedures proposed by PANE, beginning with an NRC determination to require a supplemental EIS, would take a minimum of 18 months, without allowance for contingencies.[13] PANE's representation to the Court that it should be possible for the Commission to complete administrative proceedings, including an adjudicatory hearing, by early 1983 is disingenuous in the extreme.

III. Further Factual Development Of The Case Is Unnecessary And Undesirable

PANE also argues that the petitions should be denied because it believes the facts of the case have been inadequately developed. PANE brief at 55-62. PANE asks that it be given an opportunity to present its evidence and make a factual record before the Commission. This is but a restatement of PANE's earlier argument that the petitioners should comply with the lower court's decision

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[12] Following these proceedings before the NRC, it is likely that the matter would end up again in the court of appeals, where further delay can be expected.

[13] The TMI-1 restart hearing to date, beginning with the notice of hearing on August 9, 1979, until completion of the Licensing Board's initial decisions, took almost 36 months. Commission review of that hearing has not yet been completed.

rather than appeal it. This case raises issues of law that are presented with unusual clarity and sharpness on the record as it now stands. Supreme Court review is appropriate at this time; additional factual development, with the inevitably accompanying long delays, is neither necessary nor desirable.

The case is akin to dismissal of a complaint under Rule 12(b)(6), Fed. R. Civ. P., where the plaintiff's allegations are accepted as true and it is held that they do not state a viable claim as a matter of law. Here, PANE's contentions have been accepted as true, but the Commission and Judge Wilkey in dissent concluded as a matter of law that the contentions are not cognizable under NEPA. Judge Wright concluded, to the contrary, that NEPA does encompass psychological distress caused by public fear of "recurring catastrophe" at a nuclear power plant. The legal issue is thus presented in clear focus with lengthy opinions on both sides. The issue is ripe for decision by this Court now.

PANE complains in particular that Judge Wilkey failed to make a factual distinction between "mere anxieties" and fear of "recurring catastrophe" resulting in psychological distress. PANE brief at 57.[14] The pertinence of this observation is not immediately apparent. Judge Wilkey concluded, correctly we believe, that under NEPA an effect is either cognizable or it is not. The severity of the effect goes only to its "significance" under NEPA. 678 F.2d at 242. Judge Wilkey would have held that fear-induced psychological distress is not cognizable under

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[14] Judge Wright did draw such a distinction, 678 F.2d at 230, but curiously PANE is not concerned by the factual assumptions that must underlie the distinction.

NEPA *regardless* of its severity. Thus his analysis can hardly be criticized for making unwarranted factual assumptions.

PANE also argues that Judge Wilkey should not have assumed that psychological distress cannot be measured, contrary to the "threshold finding" of the Licensing Board. PANE brief at 57.[15] Judge Wilkey did refer to the measurement problems identified by other courts that have rejected consideration of psychological factors under NEPA. 678 F.2d at 240-41. However, he also pointed out that the issue here is not measurement at all, but rather *prediction* of how individuals will react to restart, which he thought to be "particularly ephemeral and speculative." *Id.* at 240. Moreover, PANE's repeated references to the "threshold finding" by the Licensing Board are misleading because PANE fails to point out that the Board also stated:

> We cannot identify a source of evidence which would permit the measurement of the psychological stress phenomenon well enough for use in a full-scale cost/benefit balancing in an EIS. Nor do we know whether or not the state of the art can now produce such evidence.[16]

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[15] The American Psychological Association suggests that measurability problems are the only basis for reversal urged by the private petitioners. APA brief at 4. That suggestion is wholly incorrect. There are several different grounds for reversal, perhaps the most important being that NEPA decision-making should turn on the actual environmental impact of a proposed action, not on public fears of the project.

[16] *Metropolitan Edison Company* (Three Mile Island Station, Unit No. 1), LBP-80-8, 11 N.R.C. 297, 305 (1980) (Joint Appendix in the court of appeals at 71).

In the final analysis, the issue before this Court is whether NEPA was intended to make federal licensing decisions turn on public fear of the facility to be licensed, regardless of the basis for the fears or the actual safety of the facility. This is an issue that can and should be resolved as a matter of law on the present record before this Court.

CONCLUSION

For all the reasons stated above and in their petition, the private petitioners submit that the decision of the court below should be summarily reversed. In the alternative, the case should be set for briefing and argument on the merits.

Respectfully submitted,

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